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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR ESTRADA, Defendant and Appellant.	E035833 (Super.Ct.No. RIF 102916) OPINION

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. Affirmed.

George L. Schraer for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry Carlton, Supervising Deputy Attorney General, and Kristen K. Chenelia, Deputy Attorney General, for Plaintiff and Respondent.

1. Introduction[1]

A jury convicted defendant of one count of possession of heroin for sale (Health & Saf. Code, § 11351) and one count of being a felon in possession of a firearm (§ 12021, subd. (a)(1)). As to count 1, the jury found true the allegations that defendant had a prior felony conviction within the meaning of Health and Safety Code section 11370.2, subdivision (c), and was personally armed with a firearm. (§ 12022, subd. (c).) As to counts 1 and 2, the jury also found true the allegations that the crimes were committed for the benefit of a street gang. (§ 186.22, subd. (b).) Defendant admitted three strike priors, three serious felony priors, and three prison priors. (§§ 667, subds. (c) and (e)(2)(A); 667.5, subd. (a); 667.5, subd. (b); and 1170.12, subd. (c)(2).) The court sentenced defendant to a prison term of 74 years to life.

On appeal, defendant challenges the admission of his 1993 offenses for possession of a weapon and heroin, the sufficiency of the evidence to support the street-gang enhancements, the validity of the serious-felony and street-gang enhancements, and the consecutive sentencing imposed for the two convictions. We hold the admission of the prior evidence was not prejudicial error; sufficient evidence established the street-gang enhancements; the serious-felony and street-gang enhancements were otherwise valid; and the consecutive sentencing was appropriate. We affirm.

2. Facts

Defendant and his girlfriend, Sondra Torrez, had an argument early one morning

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[1] Unless otherwise stated, all statutory references are to the Penal Code.

on Smith Avenue in a residential neighborhood. At one point, defendant removed a gun from Torrez's hand and put it in his car. When one of the residents called the police, Torrez left because she had outstanding warrants.

When the police arrived, they detained defendant and his companion, Henry Segura. Both men said they had come in an Acura to pick up another car. In the Acura, police found 40.9 grams of heroin; a clear plastic bag containing nine pills and two vials of ephedrine; two syringes; plastic bags; and, in a woman's sequined cosmetics bag, a loaded Smith and Wesson revolver, eleven .38-caliber bullets, and two .357-caliber bullets. After initially disclaiming knowledge, Segura then claimed the guns and drugs were his. Later, another search of the car found a digital scale, documents bearing defendant's name, and a disposable camera containing photographs of defendant. Marc Bender, a police drug expert, testified the quantity of heroin constituted about 400 doses, worth about $8,000, and was possessed for purposes of sale.

Segura, whose street name is "Beast," testified at trial he was a drug user, primarily of methamphetamine. He had given his car temporarily to Torrez as collateral for a $200 debt. On the night before the incident, Segura and defendant planned to recover Segura's car. They spent some time at a Fontana house with some armed men where they used methamphetamine. Eventually, with Segura driving, they traveled to Smith Avenue where they met Torrez. During the drive, Segura noticed a revolver handle in the car's center console. At trial, Segura testified he told the police the gun and drugs belonged to him because he was afraid of defendant and his gang reputation. Segura felt pressured by defendant to take responsibility.

Segura thought he would be killed for testifying against defendant based on a fight that occurred a couple weeks before the encounter with Torrez. In the previous incident, George Duenas, "Toty," tried to collect drug money from Segura, possibly on defendant's orders.

A defense investigator testified Segura told him the drugs were his.

Other pertinent facts will be discussed as necessary.

3. The 1993 Offenses

In January 1993, defendant was observed reloading a revolver while standing by a vehicle with its windows shot out. Defendant was arrested and found in possession of a Smith and Wesson revolver, containing six expended shell casings; four .357-magnum bullets; and three balloons containing heroin in a quantity about the size of a pencil eraser, called a "pollywog" or "tadpole." The court allowed the prosecution to introduce evidence of these offenses in the present case to show intent, motive, knowledge of heroin, knowledge of the presence of heroin and a gun, and modus operandi.

Under Evidence Code section 1101, subdivision (b), evidence of other offenses may be admitted to prove motive, intent, and knowledge. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) The court must consider the materiality of the fact to be proved, the probative value of the evidence balanced against the potential prejudice, and the existence of a rule or policy requiring exclusion of the evidence. (*People v. Thompson* (1980) 27 Cal.3d 303, 315; *People v. Kipp* (1998) 18 Cal.4th 349, 371; Evid. Code, § 352.) The trial court's decision may not be reversed absent a clear showing of abuse of discretion. (*People v. Matson* (1974) 13 Cal.3d 35, 40.)

Defendant contends the 1993 offenses constituted impermissible evidence because it served primarily to show defendant had the propensity to commit drug and weapon-related crimes simultaneously. Defendant argues the evidence was not necessary because the large amount of heroin belied any credible defense claim the drug was not being possessed for sale in the present case. But defendant contends three doses of heroin found in the earlier case suggest personal use, not possession of the drug for sale. Similarly, possession of a gun, when combined with possession of a small amount of heroin, does not tend to show defendant possessed a gun in combination with a large amount of heroin for sale.

In contrast, the People assert intent and knowledge were elements of the crime of possession for sale and that possession of a gun before and on this occasion tended to show defendant kept the gun to facilitate drug sales.

We observe both the People and defendant offer plausible arguments about why the evidence should or should not be admitted. We are inclined to agree with defendant that the circumstances of the 1993 offenses – possession of a tiny amount of heroin and the same make of revolver 10 years before -- do not go far in showing defendant possessed a large quantity of heroin with the intent to sell it and was using a gun to facilitate the drug sales.

But we are also persuaded by the People's argument that any error in allowing evidence of the prior offenses was harmless because the gun, together with the large quantity of heroin, almost indisputably established intent, motive, and knowledge. The other facts of the case strongly supported that defendant, rather than Segura, had

possession of the heroin and the gun. The evidence showed defendant controlled the car, particularly since Torrez had Segura's car. Nothing connected the gun to Segura. It appeared to belong either to Torrez or to defendant.

The evidence of the 1993 offenses may have been consistent with defendant's present behavior but admitting it did not constitute prejudicial error in light of the strong evidence of defendant's culpability even considering the length of the jury's deliberations. (*People v. Rivera* (1985) 41 Cal.3d 388, 393; *People v. Cardenas* (1982) 31 Cal.3d 897, 907.)

4. Sufficiency of Evidence for Street-Gang Enhancements

The prosecution presented two gang experts. Tony Garcia testified defendant is a member of the Cucamonga Kings. Duenas was also a member. Segura was an associate but not a member. The gang's criminal activities include murder, assault with deadly weapons, burglaries, automobile theft, and drug sales. In Garcia's opinion, defendant possessed the gun and heroin for the gang's benefit.

Leo Duarte testified that defendant is also a member of the Mexican Mafia, a prison gang involved in murder, assault, extortion, narcotics trafficking and witness intimidation. Defendant is in charge of the Mexican Mafia in the Inland Empire. Because Segura was a heavy drug user, he was not likely to be a member of the Mexican Mafia. Duarte's opinion was the drugs in this case were used to generate revenue for the Mexican Mafia.

A former gang member for the defense testified that a gang member would prefer a large gun and would not use a five-shot revolver or carry it in a sequined bag. Not all

crimes committed by a gang member are for the benefit of the gang and high-ranking gang members do not risk being present when crimes are committed. The defense investigator said the revolver was a "female's weapon," not generally carried by a gang member.

A gang enhancement requires a showing that the underlying felony was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, . . ." (§186.22, subd. (b)(1); *People v. Gardeley* (1997) 14 Cal.4th 605, 615-616.) The standard of review is favorable to the prosecution, even when the evidence is circumstantial. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.) Defendant argues no such specific intent was shown where the offenses seemed to involve a personal benefit, not a benefit for a gang.

The expert testimony supported a reasonable conclusion by the jury that defendant's crimes were committed for the benefit of a criminal street gang. (*In re Ramon T.* (1997) 57 Cal.App.4th 201, 208.) In addition, Segura testified that defendant was a gang member who had threatened him about money collected for drugs. The fact that evidence and inferences exist contrary to the verdict does not defeat the existence of substantial evidence. (*People v. Bean* (1988) 46 Cal.3d 919, 923-933.)

5. Serious-Felony Enhancements

Defendant next challenges the three five-year enhancements imposed for the three serious-felony priors, reasoning the current offenses with gang enhancements are not serious felonies that permit the serious-felony enhancements.

Section 667, subdivision (a)(1) provides that "any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately." For purposes of section 667, subdivision (a)(4), "'serious felony' means a serious felony listed in subdivision (c) of Section 1192.7." Section 1192.7, subdivision (c)(28), passed by the electorate in Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, includes among the list of serious felonies "any felony offense, which would also constitute a felony violation of Section 186.22."

In *People v. Briceno* (2004) 34 Cal.4th 451, the court distinguished between current and former offenses enhanced by gang findings in holding that it would be improper to sentence a defendant to a five-year term for the gang enhancement. The court, however, did not state it also would be improper to impose a prior serious-felony enhancement based on the same conduct. Instead, the court stated, "while it is proper to define any felony committed for the benefit of a criminal street gang as a serious felony under section 1192.7(c)(28), it is improper to use the *same* gang-related conduct *again* to obtain an additional five-year sentence under section 186.22(b)(1)(B)." (*Briceno, supra,* at p. 465.) Therefore, *Briceno* does not support defendant's argument that the punishment imposed for the prior serious-felony under section 667, subdivision (a)(1), was unlawful.

Two recent cases *People v. Bautista* (2005) 125 Cal.App.4th 646 and *People v. Martinez* (2005) 132 Cal.App.4th 531 support the trial court's imposition of a prior

serious-felony enhancement. In *Bautista*, the Fifth District Court of Appeal recognized that under *Briceno*, a finding that a section 186.22, subdivision (b)(1) enhancement is true is "tantamount to a finding that the offense . . . [is] a serious felony pursuant to section 1192.7, subdivision (c)(28)," which, in turn, forms the basis of a five-year enhancement under section 667, subdivision (a). (*Bautista, supra,* at p. 657.) In *Martinez*, the same court explained its holding in *Bautista*: "As we recognized in *Bautista*, a defendant cannot properly be punished for engaging in conduct that supports a gang enhancement and then, solely because that conduct makes the felony 'serious,' also punish him or her under subdivision (b)(1)(B) of the gang enhancement. Subdivision (b)(1)(B) of section 186.22, thus, can apply only where the felony is serious for some reason other than the conduct that brings subdivision (b)(1) into play. Otherwise, . . . section 186.22, subdivision (b)(1)(A) would be superfluous. [Citation.] This has nothing to do, however, with the question whether appellant can be punished under both section 186.22, subdivision (b)(1)(A), and section 667, subdivision (a). Under *Coronado* [(1995) 12 Cal.4th 145] and *Bautista*, he can." (*Martinez, supra,* at pp. 536-537, italics added.)

Based on the above, we hold that imposing a prior serious-felony enhancement would not constitute impermissible dual use of gang-related conduct. Here, the gang-related conduct was punished once as an enhancement under section 186.22, subdivision (b)(1). It was further used to define the present offense as a "serious felony" in order to impose additional punishment for a prior offense. Each enhancement served a different purpose and punished different conduct. A gang-related enhancement goes to the nature of the offense and increases punishment based on the circumstances accompanying the

crime. In contrast, "[p]rior offense enhancements go to the nature of the *offender*, punishing him . . . for the habitual commission of crimes." (*People v. Kane* (1985) 165 Cal.App.3d 480, 487.) Therefore, the trial court properly imposed the three prior serious-felony enhancements.

6. The Two Three-Year Street-Gang Enhancements

Defendant contends the six years imposed for the two street-gang enhancements must be stricken because, where defendant receives a life sentence for the underlying offense, the street-gang allegation can be punished only with an order that defendant serve 15 years before he is eligible to be released on parole on the underlying charges. As set forth in section 186.22, subdivision (b)(5): "Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." Relying on *People v. Montes* (2003) 31 Cal.4th 350, 353, 356-362 and *People v. Lopez* (2005) 34 Cal.4th 1002, 1004-1011, defendant explains that subdivision (b)(5) is an alternate penalty to the street-gang enhancement which applies where the underlying penalty is punishable with a life term as under the Three Strikes law.

In opposition, the People note that *Montes* holds subdivision (b)(5) "applies only where the felony by its own terms provides for a life sentence" (*Montes, supra,* 31 Cal.4th at p. 352), not where the life sentence is imposed because of a recidivist sentencing scheme like Three Strikes. Where the crime itself does not prescribe an indeterminate sentence then subdivision (b)(5) does not apply. The *Montes* court

recognized the purpose of section 186.22 was to increase punishment for gang-related crimes. (*Montes, supra,* at pp. 361-362.) That purpose would not be served if subdivision (b)(5) applied to sentences of 25 years to life imposed under the Three Strikes Law. Instead, defendant would not receive any additional punishment in the form of a gang enhancement.

In *Montes*, the defendant was sentenced to seven years for attempted murder with a 25-year-to-life firearm enhancement pursuant to section 12022.53, subdivision (d). He claimed that the 25-year-to-life enhancement term brought him within the life term provision of section 186.22, subdivision (b)(5), and hence that he was subject only to a 15-year minimum parole eligibility period and not to a determinate term.

The Supreme Court ruled that subdivision (b)(5) "applies only where the felony by its own terms provides for a life sentence." (*Montes, supra,* 31 Cal.4th at p. 352.) The court examined the intent of the voters in enacting Proposition 21, which reenacted as subdivision (b)(5) substantially similar language contained in the original section 186.22. The enrolled bill report prepared for that legislation provided an attachment summarizing "the offenses punishable by imprisonment for life" which were "potentially impacted by the predecessor to section 186.22[, subdivision] (b)(5)." The Supreme Court observed that, in each such offense, "*the statute* defining *the felony itself* provided for a life term." (*Montes, supra,* 31 Cal.4th at pp. 357-358.) The Supreme Court rejected the approach of the Court of Appeal, which "looked to a *different* section of the Penal Code (section 12022.53(d)), not incorporated in the language of the felony provision itself (attempted murder), in order to find that the felony provided for a life term." (*Montes, supra,* at p.

359.) The Supreme Court explained that "[t]he Court of Appeal erred in the present case because it incorporated into the attempted murder statute a firearm enhancement that is not contained within the definition of the attempted murder statute." (*Id.* at p. 359, fn. 11.)

In *Lopez*, the Supreme Court held that a 25-year-to-life term imposed for first degree murder constitutes "'imprisonment in the state prison for life'" within the meaning of section 186.22, subdivision (b)(5), and therefore only the 15-year minimum parole eligibility period, rather than a determinate enhancement, can be imposed for first degree murder committed for the benefit of a criminal street gang. (*Lopez, supra*, 34 Cal.4th at p. 1004.)

At issue in appellant's case is whether a sentence of 25 years to life imposed under the three strikes law, for a crime in which the prescribed punishment is not otherwise a life term, constitutes "imprisonment in the state prison for life" within the meaning of section 186.22, subdivision (b)(5). We conclude that *Montes* governs the case of a 25-year-to-life third-strike sentence for a crime not otherwise punishable by an indeterminate term.

Defendant asserts the life term imposed here constitutes the punishment under the alternate three strikes sentencing scheme. However, the language of *Montes* appears to encompass alternate sentencing schemes set forth in statutes other than those defining a crime as well as enhancements. Reference to the three strikes law and its sentencing scheme constitutes reference to a provision that is a "*different* section . . . not

incorporated in the language of the felony provision itself." (*Montes, supra*, 31 Cal.4th at pp. 358-359.)

We note that, while a person convicted of first degree murder and sentenced to 25 years to life is subject merely to the 15-year minimum parole eligibility period, defendant is subject to a term of 25 years to life plus a three-year enhancement even though the offenses of which he was convicted, possession of a gun and heroin, are far less serious offenses. However, as has frequently been pointed out, a recidivist does not stand in the same position as a person without a felony record. (See *People v. Applin* (1995) 40 Cal.App.4th 404, 409.) Otherwise, imposition of the criminal street gang enhancement would be precluded for most third strike defendants.

Defendant was sentenced to 25 five years to life because of his three prior strikes. The felony crimes of possession of heroin for sale (Health & Saf. Code, § 11351) and of being a felon in possession of a weapon (§ 12021, subd. (a)(1)) do not provide for a life sentence. Under *Montes* and *Lopez*, subdivision (b)(5) does not apply to protect defendant from the additional sentences for the gang enhancements. We conclude that the determinate enhancements were properly imposed.

7. Section 654

Defendant's final argument is one of his two consecutive sentences of 25 years to life should be stayed pursuant to section 654, citing *People v. Bradford* (1976) 17 Cal.3d 8, 22: "The standard for applying section 654 in the circumstances of this case was restated in *People v. Venegas* (1970) 10 Cal.App.3d 814. 'Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms concealable

upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.' (*Id.*, at p. 821, citations omitted.)"

Defendant emphasizes the heroin and drugs were in the Acura at the same time. There was no evidence defendant possessed the gun before the heroin or after the police confiscated the drugs and the weapon. Additionally, the prosecution repeatedly argued that defendant used the gun to facilitate heroin transactions.

On the other hand, section 654 does not apply where separate offenses do not have a single purpose or objective. (*People v. Hudgins* (1967) 252 Cal.App.2d 174, 184-185.) Defendant was an active gang member in two gangs whose *raison d'être* is to commit crimes using weapons. The trial court could reasonably conclude defendant possessed a gun for general gang purposes and his own protection in addition to using it for heroin transactions. Defendant plausibly possessed the gun for multiple purposes and objectives. Section 654 did not apply.

8. Disposition

We affirm the judgment.

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s/Gaut
J.

We concur:

s/McKinster
Acting P. J.

s/King
J.